

Valley West Welding Company, Inc. and Aluminum Workers International Union, AFL-CIO. Cases 26-CA-6722, 26-CA-6894, 26-CA-7081, and 26-CA-7700

December 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND ZIMMERMAN

On June 27, 1980, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs; Respondent filed an answering brief to the exceptions filed by the General Counsel and the Charging Party;¹ and the Charging Party filed a brief in opposition to Respondent's exceptions.²

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,³ find-

¹ Respondent has also filed a motion to strike the General Counsel's and the Charging Party's exceptions because, *inter alia*, they fail to set forth specifically the questions of procedure, fact, law, or policy to which exceptions are taken, and fail to notify the Board of the grounds for their exceptions or the portions of the record relied on in support of their position. Sec. 102.46(b) of the Board's Rules and Regulations, Series 8, as amended, states that any exception which does not comply with the requirements of that section "may be disregarded." Although the General Counsel's and the Charging Party's exceptions do not comply fully with the requirements of the rule, we have decided not to disregard them as they sufficiently designate the portions of the Decision they claim are erroneous. *Rice Growers Association of California*, 224 NLRB 663 (1976); cf. *Carbona Mining Corporation*, 198 NLRB 293 (1972).

² The Charging Party also filed a motion requesting that the Board take administrative notice of the pleadings filed by Consolidated Aluminum Corporation in *Valley West Welding Company, Inc. v. Aluminum Workers International Union, AFL-CIO, et al. v. Consolidated Aluminum Corporation*, Civ. No. 78-3244-NA-CV (M.D. Tenn.). The motion is hereby denied, as these pleadings, even if true, are irrelevant to the adjudication of this case.

³ Respondent has excepted to the Administrative Law Judge's ruling receiving into evidence, over Respondent's objection, the affidavit of Francis H. Fischer, an employee of Consolidated Aluminum Corporation, executed by him for use in other litigation. We find merit in this exception. The General Counsel averred at the hearing that Fischer was unable to testify within the meaning of Rule 804(a)(2) and (4) of the Federal Rules of Evidence because of physical illness, and contended that his affidavit was therefore admissible under Rule 804(b)(5). The Administrative Law Judge received the affidavit into evidence, despite the General Counsel's failure to present any medical evidence to support its averment that Fischer was unable to appear because of illness. In these circumstances, the Administrative Law Judge erred in receiving the Fischer affidavit in evidence, since the Board does not permit the introduction of such affidavits absent a clear showing that the affiant is either deceased or so seriously ill that the taking of oral testimony posed a threat to the witness' health. See, e.g., *Limco Mfg. Inc., and/or Cast Products Inc.*, 225 NLRB 987, fn. 1 (1976), *enfd.* without opinion 96 LRRM 2791 (3d Cir. 1977). However, we find that Respondent was not prejudiced by this error, as we have dismissed that portion of the complaint in support of which the affidavit was introduced.

ings,⁴ and conclusions of the Administrative Law Judge to the extent consistent herewith, and to adopt his recommended Order, as modified herein.

The Administrative Law Judge found, *inter alia*, that Respondent did not violate Section 8(a)(5) of the Act when it withdrew recognition from the Charging Party (hereinafter the Union), and therefore that Respondent did not violate the Act by unilaterally subcontracting out certain unit work, or by implementing policy of verbal and written warnings. He also found that Respondent did not violate Section 8(a)(3) by laying off a substantial part of its work force after expiration of its anode stem repair contract with CONALCO. However, the Administrative Law Judge did find that Respondent violated Section 8(a)(1) by refusing to permit union steward Charles Doyle Smith to accompany employee Nelson Wright to an investigatory interview,⁵ and by threatening an employee with reprisal for engaging in union and concerted activities.

In addition, the Administrative Law Judge set aside an informal settlement in Case 26-CA-6722, because of the postsettlement unfair labor practices noted above. He considered each of the allegations in the complaint issued in that case and found that Respondent violated Section 8(a)(3) by unlawfully discharging employees Michael Poyner and Nelson Wright, and violated Section 8(a)(1) by various threats made by Supervisors Walter Russell and Teddy R. Scholes. He found that Respondent did not violate Section 8(a)(3) when it established a night shift and hired temporary employees to staff it rather than permitting unit employees to perform the additional work at overtime rates.⁶

Finally, the Administrative Law Judge dismissed the complaint in Case 26-CA-7700, wherein the General Counsel alleges that Respondent unilaterally implemented changes both in employees' pay rates and in a method for evaluating employees for recall, in violation of Section 8(a)(3), and discrimin-

⁴ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless a clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

⁵ However, the Administrative Law Judge found that Respondent did not thereby also violate Sec. 8(a)(5), since it had no obligation to permit union representatives to attend investigatory interviews after it lawfully withdrew recognition from the Union.

⁶ The General Counsel also alleges that Respondent violated Sec. 8(a)(5) by establishing the night shift without notice to or consultation with the Union. The Administrative Law Judge made no finding on this allegation, stating that, even if Respondent's conduct could have violated Sec. 8(a)(5), the imposition of a bargaining order would be inappropriate inasmuch as Respondent lawfully withdrew recognition from the Union.

atorily devised a warning system to avoid recalling laid-off employees, in violation of Section 8(a)(3).⁷

We agree with these findings.⁸ However, we do not agree with the Administrative Law Judge's finding that Respondent violated Section 8(a)(3) of the Act when it issued verbal and written warnings to employee James E. Hatcher. Nor do we agree with his finding that consideration of all the layoffs were time-barred by Section 10(b). Finally, we do not agree that Respondent violated Section 8(a)(3) by constructively discharging employee Charles Doyle Smith.⁹

1. The Administrative Law Judge found that Respondent violated Section 8(a)(3) by implementing a new progressive disciplinary system and by issuing to employee James E. Hatcher a written warning pursuant thereto. In August 1977, approximately 2 weeks after the employees returned to work following a strike, Respondent issued Hatcher a warning pursuant to a newly instituted progressive disciplinary system, purportedly because of its dissatisfaction with Hatcher's production record. The Administrative Law Judge found that the warning was "pretextual and largely unjustified." He found that Respondent knew that Hatcher's poor production during the time in question was due, at least in part, to the need for Hatcher to spend about 5 hours straightening a pattern, and concluded that Hatcher's discipline was, in fact, caused by the employees having engaged in the strike. Respondent excepted to this finding, contending, *inter alia*, that consideration of this alleged violation was barred by the 6-month limitation period of Section 10(b). We find merit in this exception.

Although the record is unclear as to the exact date Respondent issued the warning in question,¹⁰ Hatcher testified without contradiction that he received the warning "about two weeks" after the employees ended their strike on or about August 1, 1977, thereby making the date of his warning, at the latest, August 20, 1977. Hatcher's warning was not addressed in any charge filed in this matter until the Union, on March 3, 1978, filed its second amended charge in Case 26-CA-6894.¹¹ As the

⁷ The Administrative Law Judge found that in considering employees for recall from layoff, "[t]here is no evidence to indicate that the Respondent used any criteria other than experience or ability in determining which of the employees laid off to recall." In fact, the record reflects that Respondent also considered employees' attendance records and warnings given to employees.

⁸ For the reasons set forth in his separate opinion herein, Chairman Van de Water would not find that Respondent violated Sec. 8(a)(1) by refusing to permit former union steward Smith to accompany employee Wright to an investigatory interview. Nor would he set aside the settlement agreement.

⁹ Member Jenkins would find that Respondent did, in fact, constructively discharge Smith. See his separate opinion on this issue, *infra*.

¹⁰ The written warning was not placed into evidence.

¹¹ The second amended charge in Case 26-CA-6894 stated, in relevant part:

Union did not file within 6 months of the date of the alleged unfair labor practice a charge which supports the issuance of a complaint, we find that consideration of this alleged violation is barred by Section 10(b) of the Act, and, accordingly, dismiss the complaint in this regard.¹²

2. The Administrative Law Judge dismissed the complaint in Case 26-CA-7081 insofar as it alleges that Respondent violated Section 8(a)(3) of the Act in August 1977 by refusing to submit bona fide bids to CONALCO for anode stem repair work, and consequently laying off 13 employees because of the resultant lack of work, in retaliation for the employees' support of the Union. The Administrative Law Judge found that the General Counsel failed to establish that the layoffs violated Section 8(a)(3), but that in any event consideration of this issue was time-barred by Section 10(b) since the charge upon which this allegation is based was filed on February 27, 1978, more than 6 months after the events complained of.

We agree with the Administrative Law Judge that the record fails to establish that the layoffs violated Section 8(a)(3). However, we do not agree with his conclusion that all the layoffs were outside the 10(b) period. As found by the Administrative Law Judge, the record reveals that Respondent laid off 13 employees in 2 separate layoffs. Although not found by the Administrative Law Judge, the record reveals that Respondent laid off nine employees on August 11, 1977, more than 6 months prior to the filing on February 27, 1978, of the charge in Case 26-CA-7081, upon which the allegation is based. However, the record reveals that Respondent laid off four additional employees on August 31, 1980, within the 10(b) period. Therefore, consideration of the events surrounding these four layoffs is not time-barred. However, in viewing the record as a whole, we agree with the Administrative Law Judge that no violation of Section 8(a)(3) has been shown.

3. The Administrative Law Judge concluded that Charles Doyle Smith's decision to quit his employment, immediately after Reeves refused him admittance to the Wright interview and told him to return to work or his "ass would be fired," was a result of Respondent's unlawful acts toward him

Since on or about August 1, 1977, [the Employer], by its officers, agents and representatives issued verbal and oral warnings to its employees because of their membership and activities on behalf of Aluminum Workers International Union.

This element of the charge was reiterated in the Union's third amended charge in Case 26-CA-6894, filed on March 8, 1978.

¹² In finding consideration of the Hatcher warning to be barred by Sec. 10(b), we deny any implication in the Administrative Law Judge's Decision that Respondent's implementation of the disciplinary system violated Sec. 8(a)(3) of the Act, since this was neither alleged as a violation nor was the matter fully litigated at the hearing.

and other employees and therefore constituted a constructive discharge. We disagree. In our view, Smith was not subjected to a campaign of harassment which warrants a finding of constructive discharge.

In *Crystal Princeton Refining Company*, 222 NLRB 1068 (1976), the Board set forth elements required to show a constructive discharge. The Board stated:

There are two elements which must be proven to establish a "constructive discharge." First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.¹³

The record lacks any evidence that Respondent adversely affected Smith's working conditions, or otherwise harassed Smith, in an effort to induce his resignation. In fact, Smith admits that he resigned solely in response to Reeves' treatment of him at the Wright interview and at a prior disciplinary interview with employee James F. Hatcher. Even though Wright had a right to have Smith present at his disciplinary interview,¹⁴ the Board has long held that an employee who quits in protest against unfair labor practices is not deemed to have been constructively discharged.¹⁵ Further, representation rights accrue to the employee who is subjected to an investigatory interview, not to the individual who would be the representative, or to a union as collective-bargaining representative. Thus, Smith cannot be said to have resigned over any illegal action taken by his employer against him. As the record lacks any other evidence of harassment of Smith by Respondent, we find that Smith was not constructively discharged.¹⁶

¹³ *Id.* at 1069; see *Keller Manufacturing Company, Inc.*, 237 NLRB 712, 722-723 (1978).

¹⁴ See *P. E. Van Pelt, Inc., d/b/a Van Pelt Fire Trucks*, 238 NLRB 794 (1978); *Local Union 8, International Brotherhood of Electrical Workers (Romanoff Electrical Corp.)*, 221 NLRB 1131, 1135 (1975), and cases cited therein, but see fn. 8, *supra*.

¹⁵ *Liberty Markets, Inc.*, 236 NLRB 1486 (1978), cited by the Administrative Law Judge, is inapposite. In that case, the Board found a constructive discharge where a number of supervisors engaged in a campaign of "harassment and humiliation" against an employee, which included unlawful transfers and unwarranted criticisms of the employee's work. Here, in contrast, the "harassment" which precipitated Smith's discharge was nothing more than Reeves' refusal to permit Smith to be present during an investigatory interview where Smith had no right to be.

¹⁶ As more fully detailed in his separate opinion herein, Chairman Van de Water is of the view that Wright was not entitled to have a representative present at his interview. However, he agrees that Smith voluntarily resigned his job.

Member Jenkins, in his partial dissent, suggests that an employee who is requested by a fellow employee to be his representative at an investigatory interview accrues a right to participate in that interview, the denial of which makes it "impossible [for him] to continue in his job." He therefore concludes that when the Employer barred Smith from acting as

4. Our dissenting colleague is of the view that Respondent did not violate the Act by refusing to permit Smith to be present during the Wright interview. He reaches this conclusion based on the fact that there was no union present at the plant since Respondent had lawfully withdrawn recognition from the Union. For the reasons fully expressed in our decision in *Materials Research Corporation*, 262 NLRB 1010 (1982), we would find such a violation inasmuch as we would not require that the employees involved be represented by a union.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Valley West Welding Company, Inc., Waverly, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified herein:

1. Delete paragraphs 1(d) and 2(b) and reletter the remaining paragraphs accordingly.
2. Substitute the attached notice for that of the Administrative Law Judge.

CHAIRMAN VAN DE WATER, concurring in part and dissenting in part:

While I agree with most of my colleagues' findings, I do not agree that Respondent violated Section 8(a)(1) by refusing representation during an investigatory interview to employee Nelson Wright, or that Respondent's conduct herein warranted setting aside the settlement agreement in Case 26-CA-6722.

Wright's representative, it created circumstances that amounted to a constructive discharge.

Weingarten rights (420 U.S. 251) may be invoked *only* by the employee who is the subject of the interview. Member Jenkins appears not to accept this settled point of law when he states that those rights "assertedly accrue to the employee who is subjected to the interview" in describing the Board's position, and when he indicates that such rights "customarily may initially be triggered by the employee who seeks representation, rather than the employee from whom representation is sought." It is, or should be, beyond debate that an employee who acts as a representative enjoys the protection of the Act while acting in that capacity. It does not, however, follow, as Member Jenkins would have it, that when *Weingarten* rights are denied, the would-be representative suffers a cognizable detriment under the Act any more so than would be the case if the employee being interviewed failed to request a representative despite entreaties to do so from the putative representative.

Thus, there is no evidence that Respondent "made it impossible for Smith to continue in his job" by making the job more burdensome. Smith admitted that he quit his job because he was "fed up" with the way things were going at the plant. He was not coerced into resigning. Respondent's course of conduct, no matter how serious, was not directed at Smith and did not create circumstances so intolerable that Smith could not continue his employment. The precedent relied on by Member Jenkins in asserting the contrary will not stretch so far as he would have it.

The Administrative Law Judge found, and my colleagues agree, that Respondent violated Section 8(a)(1) by refusing to permit Smith to be present during a discussion between Respondent's president, J. T. Reeves, and Wright concerning Wright's poor production record. They conclude that, even after Respondent's withdrawal of recognition of the Union, Wright was entitled to have Smith, a former union steward, present at the discussion. I cannot agree. As I recently stated in *Materials Research Corporation*:¹⁷ "[A]n employee's Section 7 right to representation at an interview which he reasonably believes may result in his discipline does not attach until a duly recognized or certified union is present." As Respondent lawfully withdrew recognition of the Union, Respondent had the right to exclude Smith from its meeting with Wright. Accordingly, I would dismiss that portion of the complaint.

Furthermore, since Smith was properly excluded from the interview with Wright and since Respondent had no statutory obligation to allow him to be present, Respondent acted lawfully in directing Smith to return to work. When Smith persisted in his attempts to remain at the interview, Respondent was justified in threatening to impose disciplinary action. Thus, I cannot find that Smith was constructively discharged inasmuch as he was not being asked to abandon any statutory rights.

Finally, contrary to my colleagues, I would reinstate the settlement agreement in Case 26-CA-6722. In my view, Respondent has been shown to have committed only one postsettlement violation—the threat of reprisal for engaging in union and concerted activities made by Reeves to Wright during the discussion of Wright's production record. Therefore, I find that there are insufficient subsequent unfair labor practices to warrant setting aside the settlement agreement, and I would reinstate it in its entirety.¹⁸

MEMBER JENKINS, dissenting in part:

Contrary to my colleagues, I would adopt the finding of the Administrative Law Judge that Respondent violated the Act by constructively discharging Charles Doyle Smith. I reach this conclusion based on the application of fundamental statutory precepts emanating virtually from the inception of this Board. As early as 1937, the Board set forth the axiom that "to condition employment upon the abandonment by employees of the rights guaranteed them by the Act is equivalent to dis-

charging them outright" for such activity.¹⁹ This is precisely what has occurred in this case.

The credited evidence establishes that on September 22, 1977, employee Nelson Wright requested the presence of fellow employee Smith as his representative at an investigatory interview. Up until Respondent's withdrawal of recognition from the Union, Smith had acted as steward, had served on the negotiating committee, and had aided previously in the presentation of grievances. It is undisputed that, at the time of the Wright interview, Smith was the principal spokesman on behalf of Respondent's employees. The Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(1) by denying Wright's request to have Smith act as his representative.²⁰ My colleagues, however, have elected to reverse the Administrative Law Judge's factually and legally supported finding that Respondent's conduct *vis-a-vis* Smith's employment status also violated the Act.

My colleagues in the majority have chosen to ignore the clear and unmistakable implications arising from Respondent's specific demand to Smith in connection with his representation efforts. Thus, the evidence credited by the Administrative Law Judge reveals that Respondent ordered Smith to cease his representation efforts or his "ass would be fired." The only reasonable construction of these events is that Respondent effectively conditioned Smith's continued employment on his abstaining from participation in such investigatory interviews. By overtly threatening Smith with discharge for his involvement in the exercise of protected concerted activities, Respondent made it impossible for Smith to continue in his job and maintain his participation as a representative on behalf of and in concert with other employees. To characterize Smith's resignation as "voluntary" in the face of this alternative is mystifying.

My colleagues in the majority err in their insistence upon characterizing Respondent's conduct toward Smith as limited to "bar[ring] Smith from acting as Wright's representative." Contrary to my colleagues, the foregoing characterization is a distortion of the record inasmuch as not only did Respondent unlawfully deny to employee Wright his statutory right to a *Weingarten* representative, but also ordered representative Smith to cease his representation efforts or his "ass would be fired." In these circumstances, it is evident that in view of the unlawful condition imposed upon Smith with respect to his continued employment, his subsequent coerced resignation because he was "fed up"

¹⁷ 262 NLRB 1010 (1982).

¹⁸ For the same reasons, under the principles of *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), I would provide a narrow cease-and-desist order rather than the broad order recommended by the Administrative Law Judge and adopted by my colleagues.

¹⁹ *Atlas Mills, Inc.*, 3 NLRB 10, 17 (1937).

²⁰ *Materials Research Corporation*, 262 NLRB 1010 (1982).

was anything but voluntary. Furthermore, I cannot agree with the Chairman that Respondent was "justified" in threatening to impose disciplinary action because Smith assertedly was not being asked to abandon any statutory rights. As noted elsewhere in the majority opinion, "[i]t is, or should be, beyond debate that an employee who acts as a representative enjoys the protection of the Act while acting in that capacity." In the instant case, Smith's presence as a *Weingarten* representative specifically was requested by fellow employee Wright. Therefore, *Weingarten* rights specifically were triggered and both Smith and Wright enjoyed the protection of the Act to be free from discriminatory retaliation in connection with their participation in this process. It cannot seriously be contended herein that Smith lost this protective mantle simply because Respondent unlawfully denied Wright's request for Smith's presence.

Time and time again, this Board has had little difficulty concluding that circumstances analogous to the instant case warrant a finding of constructive discharge. Thus, in *Block-Southland Sportswear, Inc., Southland Manufacturing Company, Inc.*, 170 NLRB 936, 938 (1968), violations were found where an employer effectively conditioned employment on the willingness of employees to acknowledge discriminatory punishment imposed in response to their exercise of protected activities. Similarly, in *Hoerner Waldorf Corporation*, 227 NLRB 612 (1976), we found that an employer violated the Act by conditioning employment on an employee's compliance with an unlawful no-solicitation rule. In *B. N. Beard Company*, 248 NLRB 198, 209-210 (1980), an unlawful constructive discharge was found when an employee elected to quit his job rather than relinquish his right to be compensated in accordance with contractual wage rates. More recently, in *Jack Thompson Oldsmobile, Inc.*, 256 NLRB 24 (1981), we found that an employer violated the Act when it effectively conferred upon an employee the alternative of accepting the enforcement of an unlawful unilateral change, or quitting.²¹

As in the foregoing cases, the conclusion is inescapable that the option given to Smith, to refrain from participation in investigatory interviews in concert with his fellow employees or his "ass

²¹ In *Jack Thompson Oldsmobile, Inc.*, *supra*, the employer informed the constructively discharged employee that notwithstanding the employee's protests, the employer intended to adhere to the unilateral change "and if you don't like it, get the hell out." Accordingly, it is evident that the alternative faced by employee Smith in the instant case—abstain from seeking to participate in investigatory interviews or "his ass would be fired"—is factually indistinguishable in all pertinent respects from those arising in *Jack Thompson Oldsmobile, Inc.*, wherein the employer's threatening remarks also were specifically and causally related to the employee's abandonment of statutory rights.

would be fired," was an unlawful condition for his continued employment which made his subsequent coerced resignation an involuntary constructive discharge.²² In these circumstances, I am at a loss to comprehend my colleagues' contention that there is no evidence that Respondent "adversely affected" Smith's working conditions and that Smith was not unlawfully harassed. Such a contention simply is not supported by the record and ignores both the realities of the onerous conditions placed on Smith's continued participation in protected concerted activities, as well as 45 years of well-settled case law governing such circumstances.²³

Finally, my colleagues contend that because representation rights in investigatory interviews assertedly accrue to the employee who is subjected to the interview and not to the individual who acts as the representative, Smith had "no right" to be present and, therefore, any action taken against Smith was privileged. Such an approach, which effectively condones retaliation against an employee for his participation as a *Weingarten*²⁴ representative, not only renders as a practical nullity our recent decision in *Materials Research Corporation, supra*,²⁵ but also ignores the underlying principle

²² I also agree with the Administrative Law Judge that the record amply supports a conclusion that Respondent's conduct on September 22 "signified an atmosphere of trouble and suggested that the Respondent was embarked upon a course of unlawful conduct." Thus, as set forth more fully by the Administrative Law Judge, Respondent engaged in numerous and serious unfair labor practices to an extent that we have determined that a broad cease-and-desist order is required under the principles of *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), rather than the customary narrow order. Accordingly, it is evident that Smith reasonably believed that Respondent's refusal to grant employee Wright a representative at the investigatory interview, accompanied by the condition placed on his own continued employment, was a return to the same environment underlying Respondent's previous commission of unfair labor practices and, therefore, his resignation cannot be deemed voluntary. Rather, as found by the Administrative Law Judge, his coerced resignation was the direct "result of the Respondent's unlawful acts directed toward him and other employees."

²³ My colleagues' reliance on *Crystal Princeton Refining Company*, 222 NLRB 1068 (1976), and *Keller Manufacturing Company, Inc.*, 237 NLRB 712 (1978), is misplaced. The standard set forth in those cases is largely a method for determining employer motivation in the face of the imposition of allegedly discriminatory and more burdensome working conditions. That line of cases is wholly separate and distinguishable from *Atlas Mills, Inc.*, *supra*, and its progeny, including the instant case, where a condition is placed on employees which clearly is, at minimum, causally related to the specific abandonment of union and protected concerted activities and which effectively operates as a condition precedent to the retention of employment. In short, since Respondent's conduct toward Smith on September 22 was attributable to his representation efforts, and my colleagues do not contend otherwise, the test for determining causation and motivation set forth in *Crystal Princeton* is unnecessary and inapplicable. See, e.g., *Jack Thompson Oldsmobile, Inc.*, *supra*. Further, because of the conditions placed on Smith's continued employment, the instant case is also distinguishable from other cases cited by the majority which involve the voluntary quitting of employment in mere furtherance of a general protest against employer unfair labor practices.

²⁴ *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 250 (1974).

²⁵ In *Materials Research*, Member Zimmerman joined Member Fanning and me in finding that employees in an unorganized plant possess identical *Weingarten* rights as do employees in a plant represented by a union.

Continued

of the Supreme Court's decision in *Weingarten*, *supra*, that when one employee makes common cause with a fellow employee over his separate grievance, "they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome." (Emphasis supplied.)²⁶ Thus, although the accrual of *Weingarten* rights customarily may initially be triggered by the employee who seeks representation, rather than the employee from whom representation is sought, both employees who participate therein are engaged in protected concerted activities for mutual aid or protection. Retaliation against either for such participation is, therefore, causally related to the exercise of Section 7 rights. Notwithstanding the views of my colleagues, it is evident that Respondent's conditioning of Smith's continued employment on abstaining from such participation does not transform his coerced resignation into a voluntary quit. To the contrary, Respondent's actions against Smith constitute a constructive discharge in violation of the Act. Accordingly, I dissent.

To validate an employer's conditioning of the continued employment of the principal employee spokesman on that employee's abstaining from acting as a *Weingarten* representative is to totally emasculate *Weingarten* and *Materials Research*, particularly in an unorganized setting where employees normally have no recourse to a formal grievance-arbitration procedure or ready access to a nonemployee representative. If an employer legitimately may force the coerced resignation of the principal employee spokesman acting as a *Weingarten* representative, I am puzzled as to what remains of the principles set forth in *Materials Research*.

²⁶ *J. Weingarten*, *supra* at 261, quoted in *Materials Research Corporation*, *supra*.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten our employees with shutting down the plant, with physical harm or discharge, or in any other manner because of their interest in or activity on behalf of any labor organization or because they have engaged in concerted activity protected by the National Labor Relations Act.

WE WILL NOT discharge our employees because of their interest in or activity on behalf of any labor organization or because they have

engaged in any concerted activity protected by the National Labor Relations Act.

WE WILL NOT deny our employees the right to be represented by a fellow employee during the course of disciplinary interviews.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL offer Charles Doyle Smith reinstatement to his former position, or, if that job no longer exists, to an equivalent position of employment without loss or prejudice to his seniority or any other rights or benefits, and WE WILL make him, Michael Poyner, and Nelson Wright whole for any loss of wages or other benefits they may have suffered as a result of the discrimination against them, with interest.

VALLEY WEST WELDING COMPANY, INC.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: These consolidated cases were heard before me on March 21 through March 24, 1978, and January 7 and 8, 1980.¹

It is alleged that Respondent has engaged in numerous violations of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*; however, the principal issue concerns Respondent's withdrawal of recognition of the Charging Party less than 3 months after its certification and Respondent's alleged discriminatory layoff of some 13 employees in August 1977.²

Respondent generally denies that it has engaged in any of the unlawful conduct alleged and specifically contends that it was privileged to withdraw recognition of the Charging Party because the Charging Party engaged in activity inimical to the bargaining relationship; that is, in negotiations with a company for which Respondent was a subcontractor, the Charging Party was successful in causing the subcontracting to be stopped, the effect of which was a loss of work for Respondent. Respondent further contends that, as a result of losing the subcontracting work, Respondent was forced to lay off employees; thus the layoff claimed to be a violation of the Act

¹ The hiatus between the first and the second sessions was caused by subpoena enforcement litigation involving both Respondent and a non-party employer. Respondent continues to press for dismissal of the allegations herein on grounds that the General Counsel "refused to prosecute" by seeking enforcement of the subpoenas. Respondent's motion in this regard has previously been considered and denied, by order dated December 14, 1979. It should be noted that in part Respondent claims prejudice in that in the summer of 1979 an individual who was to have been one of Respondent's principal witnesses suddenly and unexpectedly died. At the close of the General Counsel's case, Respondent rested and declined to offer secondary evidence or in any manner present a defense concerning those issues on which it is claimed the deceased was the only reliable witness. Thus any prejudice must be considered to have been waived.

² All dates are in 1977 unless otherwise indicated.

was necessitated by business exigencies caused by the Charging Party.

Upon the record as a whole, including my observations of the witnesses, briefs, and arguments of counsel, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

Respondent is a Tennessee corporation engaged in the fabrication of metal for heavy industrial plants. During the course of this operation, Respondent annually receives products valued in excess of \$50,000 directly from outside the State of Tennessee and annually ships finished products from its facility in Waverly, Tennessee, directly to points outside the State of Tennessee valued in excess of \$50,000. Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

In its answer, Respondent denies that Aluminum Workers International Union, AFL-CIO (herein the Charging Party or the Union),³ is a labor organization within the meaning of Section 2(5) of the Act because the Union engaged in the activity which Respondent contends justified its withdrawing recognition. However, it appears from the record that in fact the Union accepts as members employees of employers engaged in interstate commerce including Respondent, and in fact deals with employers engaged in interstate commerce, including Respondent, concerning grievances and other terms and conditions of employment. It is therefore a "labor organization" within the meaning of Section 2(5) of the Act, and I so find.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Factual Outline

The Consolidated Aluminum Corporation (herein Conalco) has a plant in New Jacksonville, Tennessee, at which it employs some 600 production and maintenance employees. For a number of years, the Union and its Local 220 have represented the Conalco employees and have negotiated a series of 2-year collective-bargaining agreements covering those employees.

Since at least 1971, Conalco's subcontracting of work the Union claims its members can do has been an item of dispute in negotiations. Nevertheless, Conalco continued to subcontract work; and, specifically, beginning in 1973 Conalco subcontracted to Respondent anode stem repair work.

Respondent began business in 1971 as a closely held corporation, the three principals of which, at the time material hereto, were former employees of Conalco. According to J. T. Reeves (Respondent's president at the time of the first hearing session), Respondent is "a small

welding fabrication shop that fabricates various products, whatever, to customers specifications."

While employees of Conalco had at one time done the anode stem repair work, apparently for some years Conalco had subcontracted this work, first to a company unnamed in the record and then in 1973 to Respondent. Respondent's most recent contract with Conalco for the anode stem repair work covered the period November 1976 to August 15, 1977, and was for 50 stems per week. In addition, since 1976 Respondent has contracted to do anode stem repair blocks (legs) for Conalco, as well as some other work.

Coincidentally, in the late spring of 1977 the two events which precipitated this matter occurred. First, employees of Respondent sought out the Union and an organizational campaign among them began which culminated with a Board-conducted election on May 16, the Union winning 12 to 1. Following the election, the Union notified Respondent that for administrative purposes it was attaching Respondent's employees to Local 220.

At or about the same time, Local 220 was preparing to negotiate a new collective-bargaining agreement with Conalco, their contract to expire on August 1. And, during the course of negotiations between Local 220 and Conalco, one of the principal items sought by the Union was a stronger subcontracting probation. Specifically, the Union sought a return of the anode stem repair work.

Apparently anticipating a strike, Conalco sought to have Respondent increase the amount of anode stem repair work it was doing from 50 stems per week to as many as possible. This, according to the unrefuted testimony of Reeves, resulted in Respondent hiring additional employees and starting (actually restarting) a second shift. However, again according to Reeves, inasmuch as it was felt that this increase in production would be of short duration, employees who were hired were specifically asked to sign a statement that they understood they would be temporary employees for 90 days.

The Union having been certified as the collective-bargaining representative for Respondent's employees but having attached them to Local 220 for administrative purposes, the bargaining committee included officers of Local 220 and the one employee of Respondent.

Following an exchange of letters in late May, June, and July, representatives of the Union and Respondent first met on July 15. Though unclear from the record, it appears they had a half dozen bargaining sessions until Respondent withdrew recognition on or about September 1.⁴

As indicated above, a principal issue in the negotiations between the Union and Conalco concerned subcontracting, and the Union was successful in improving, from its standpoint, the subcontracting language. Specifically, Conalco executed a "side-letter" to the Union dated July 21 which in material part reads:

³ As will become apparent, the International and its Local 220 are, for purposes of this case, indistinguishable. Thus "the Union" refers either to Local 220 or the International.

⁴ The initial charge in Case 26-CA-6722 was filed on June 2 and a first amended charge was filed on July 1. The parties entered into a settlement agreement on August 8 approved by the Regional Director on August 15. The settlement agreement was set aside by the Regional Director and the issues involved in the first complaint are before me, *infra*.

This letter is written to set forth the understanding reached in the 1977 negotiations regarding stem repair and engine rebuild at our New Jacksonville Plant.

Anode stem repair work, presently being performed by Valley West Welding and engine repair, presently being performed by various suppliers, will be performed in the plant by bargaining unit employees prior to the conclusion of the 1977 Labor Agreement. Timing of these matters will depend on availability of capital money, equipment and engineering design work.

It is further understood that if this work cannot be economically performed by the bargaining unit, the Company retains the right to find other means after a reasonable trial period of approximately one (1) year to eighteen (18) month [sic].

Representatives of the Union testified that they never took steps to implement the side letter and would not have done so had they been able to negotiate a "standard" agreement with Respondent. However, the side letter was presented by Union to Respondent during negotiations with the observation that the Union had Respondent by the "ying-yang." Further, in September Conalco did begin to install the necessary equipment to do anode stem repair work at its facility.

Apparently, though unclear from the record, as a result of the inventory buildup during the spring and early summer noted above, while Conalco did in fact need stems, the need was not as pressing as had been. Thus, during the transition period Conalco asked Respondent to bid on additional work, on a weekly or monthly basis. Respondent was unwilling to bid this work for a short term, and as a result ceased doing anode stem repair work in August. This necessitated a layoff, first of nine, and subsequently four, employees, some of whom have been recalled following the acquisition of additional work.

Though unclear precisely when or how Respondent withdrew recognition from the Union, on September 16 Respondent filed a motion for revocation of the certification in Case 26-RC-5502 which was denied by the Regional Director on September 20. Respondent took an appeal to the Board which ruled, "Employer's request for review of Regional Director's Order is hereby denied. Said denial is without prejudice to employer's renewing its contention as a defense to the 8(a)(5) in Case 26-CA-6894. Cf. *Catalytic Industrial Maintenance Company*, 209 NLRB 641 (1974)."

B. The Post-Settlement Conduct

1. The withdrawal of recognition

The facts outlined above are not in substantial dispute. Further, all parties seem to agree that the controlling case authority in this matter is *Catalytic Industrial Maintenance Company*, *supra*. The parties differ only in their analysis of the principles in that case to the facts herein. I agree with Respondent that *Catalytic* is controlling and

that it was fully justified in withdrawing recognition from the Union when it did.

In *Catalytic* Respondent had a contract with another company to do most of that company's maintenance work. The union represented the employees of both. In a case alleging that *Catalytic* had refused to bargain, *Catalytic* defended on grounds that the union could not represent both its employees and employees of the company for which it did work. In denying this defense and finding the violation (196 NLRB 228 (1972)), the Board adopted the decision of the Administrative Law Judge who noted that the union had not engaged in any overt act inimical to the bargaining relationship; but, should such occur in the future, it would be considered in an appropriate proceeding.

Thereafter, the union undertook to force the contracting company to do all of its own maintenance work, the effect of which would have been to cease having *Catalytic* as a contractor for this work. And the union published a leaflet stating its intention to negotiate an agreement along these lines.

Catalytic thus filed a petition to revoke the union's certification of its employees. The Board revoked the certification and vacated its earlier order. The Board concluded that by seeking to force the contracting employer to retain for its own employees work which it had contracted to *Catalytic*, the union was acting in substantial conflict of its obligations to the employees of *Catalytic*, and that such a conflict was inherently inimical to the bargaining relationship between the union and *Catalytic*.

Such is almost the precise factual situation here, except this is a much stronger case. Here the Union not only sought to have Conalco withdraw work from Respondent but in fact was successful in doing so. The Union negotiated an agreement with Conalco whereby Conalco would begin doing the anode stem repair work then contracted to Respondent and Conalco began to implement this agreement. The natural and probable effect of this was for Respondent, and therefore its employees, to lose work. While the record is unclear concerning the precise amount of work lost to Respondent as a percentage of its gross volume, there is no question but what the loss of work was significant.

The General Counsel contends, however, that inasmuch as this work was fairly claimable by the Union for the Conalco bargaining unit, and therefore its act was not an unfair labor practice, Respondent was not justified in withdrawing recognition. Though the Union's act may not have been unlawful, its claim on behalf of one group of employees affected the work available for another group. And the Union represented both groups. Such was a substantial conflict of its duty to Respondent's employees whom it represented. Respondent was justified in seeking the certification to be revoked. Failing that, Respondent was justified in refusing to bargain further with the Union as the representative of its employees. I therefore conclude that Respondent did not violate Section 8(a)(5) of the Act.

2. The layoffs

As noted above, Respondent's contract to do anode stem repair work expired on August 15. At that time Conalco was in the process of tooling up to do the work pursuant to its agreement with the Union but was not yet ready. Thus, Conalco undertook to have Respondent continue to do the anode stem repair work for a short time and requested Respondent make a bid for 500 stems. Respondent did in fact bid at a unit price rate of about one-half again the 1976-77 rate. This bid was rejected; and as a result of not having any anode stem repair work, a layoff was necessitated. The General Counsel contends that this layoff was violative of Section 8(a)(3) of the Act inasmuch as Respondent could have avoided a layoff by bidding on the anode stem repair work at, or near, the 1976-77 unit cost.

Secondly, the General Counsel contends that the layoff must necessarily be viewed as discriminatory inasmuch as 13 of Respondent's 16 or 17 employees were laid off although the record indicates that the anode stem repair work consisted of only one-tenth of 65 percent of Respondent's total volume. While the record is somewhat unclear concerning the total volume of Respondent's work and what part the anode stem repair work played, it does appear that in fact the anode stem repair work amounted to a significant amount of Respondent's total volume of work. The dollar amount of the stem repair *vis-a-vis* other work is not determinative of the number of jobs involved because the contract amount includes materials. That the loss of this work might reasonably involve as many as 13 jobs is supported by the testimony of Douglas Pate, the president of Local 220, and a principal in the negotiations both with Conalco and Respondent. Pate testified that there are eight Conalco employees in the job classification now doing the anode stem repair work.

Though I believe the General Counsel has failed to establish the layoff was violative of Section 8(a)(3), in any event this allegation is time-barred by Section 10(b). Nothing in the post-layoff charge filed on September 30, 1977, or the complaint issued on November 10, 1977, makes any reference to the layoff allegation. The charge upon which this allegation is based was filed on February 27, 1978, more than 6 months after the events complained of. In such circumstances, further proceedings with respect to the layoffs are precluded. *Allied Industrial Workers of America, AFL-CIO, and its Local Union No. 594 (Warren Molded Plastics, Inc.)*, 227 NLRB 1541 (1977); *Hunter Saw Division of Asko, Inc.*, 202 NLRB 330 (1973).

3. The subcontracting

In the consolidated complaint, it is alleged that Respondent violated Section 8(a)(5) of the Act by unilaterally, and without notice to the Union, subcontracting unit work. Specifically, the General Counsel contends that, on or after June 1, Respondent subcontracted some of the anode stem repair blocks to the United States Steel Corp. The evidence is that this subcontracting did in fact occur without notice to, or consultation with, the Union, and was caused by Respondent's increased pro-

duction of anode stem repair work for Conalco. At the time that Respondent began the unilateral subcontracting, the Union was validly certified and Respondent was obligated to bargain with it.

Nevertheless, as I have concluded that the Union's certification should be vacated, it follows that whatever violations of its bargaining duty Respondent may have committed could not be appropriately remedied. Respondent cannot be ordered to bargain with the Union (the remedy for such a violation) from which it justifiably withdrew recognition. Accordingly, I will recommend that this allegation be dismissed.

Similarly, it is alleged that, on August 1, Respondent unilaterally and without notice or consultation with the Union changed the terms and conditions of employment by issuing a policy of verbal and written warnings. Again, the record reveals that in fact Respondent engaged in the activity alleged; but again, in view of the fact that the Union's certification should be vacated, no remedial order for this alleged violation would be appropriate.

4. The denial of representation

On September 22, Nelson Wright was called into Reeves' office and was interviewed about his production (more specifically the lack of it) by the three owners of Respondent and Supervisor Freddie Scholes. Wright was told that his production had substantially declined and was asked why. There ensued a discussion about this matter. Prior to entering the office, Wright had asked a fellow employee to find Charlie Doyle Smith, the union steward, to come to the office. Smith did appear but was told by Reeves to go back to work.

Reeves denied that Wright asked for Smith's presence or that Smith said anything about representing Wright in his capacity as union steward. However, Reeves did admit that Smith appeared at the meeting and asked if he was needed, but was told no and was told to return to work.

The testimony of Wright and Smith, which I credit over Reeves, is to the effect that Smith specifically stated to Reeves and the other owners that he was there to represent Wright, but was not allowed to. After Smith was told to return to work, Reeves continued the interview of Wright.

It is clear that Smith, who was known to be the employees' spokesman, appeared at a disciplinary interview of another employee and was denied admittance. Thus, even accepting Reeves' version of this event, which I do not, it is clear that Wright was denied the opportunity to have a fellow employee present during the course of an interview which could reasonably lead to his discipline. This denial by Reeves, coupled with his continued interview of Wright, was clearly inhibitive of employees' rights protected under Section 7 of the Act and was violative of Section 8(a)(1), notwithstanding that at the time Respondent was no longer required to bargain with the Union. An employee's right to have another employee present during the course of a potential disciplinary interview is not confined to the situations where employees are represented by a labor organization. *Glomac Plas-*

tics, Inc., 234 NLRB 1309 (1978). I therefore conclude that, in denying Nelson Wright the right to have fellow employee Smith present at the September 22 interview, Respondent violated Section 8(a)(1) of the Act.

This event is also alleged to have been violative of Section 8(a)(5). Without regard to whether or not such constituted a unilateral change, suffice it to note that, given Respondent's lawful withdrawal of recognition from the Union, a bargaining remedy cannot be entered.

5. The threat

Wright testified that during the course of the September 22 interview, and after Smith's appearance, Reeves asked why Wright needed Smith to which Wright responded that he was representing the Union. There then ensued the conversation concerning the Union with Reeves stating that he did not care whether Wright belonged to one or a hundred unions, "This place wasn't union yet and it may not ever be." And Reeves stated, noting that Wright had been discharged previously but was reinstated as was part of the settlement agreement, "he done fired his other lawyer and he had him a good lawyer now, and that there wasn't no Labor Board or no union was going to get my job back this time, and when he wrote this check it would be my last one."

Although Reeves denied making any of these statements attributed to him by Wright, in view of the total context to this case, the history of the employees' union activity, including Wright's previous discharge and the fact that Reeves and the other officers of the Company had called Wright into his office to discuss Wright's low productivity, I conclude that comments along the lines testified to by Wright probably occurred. In addition, I found Wright to be a generally credible witness and, since Reeves' denial was general rather than specific, I conclude that Reeves said, in effect, that, if Wright were discharged in the future, he would not get his job back. In the context of this matter, such necessarily constitutes a threat of reprisal for engaging in union and concerted activity and is therefore violative of Section 8(a)(1) of the Act.

6. The alleged coercion

The General Counsel similarly contends that when Reeves told Wright that the Company was no longer "union" such amounted to coercion in violation of Section 8(a)(1) of the Act. Whether such a statement would be coercive as a general principle, because the Company had recently and correctly withdrawn recognition of the Union, I conclude that here such was simply a true statement of fact. I therefore conclude that this allegation should be dismissed.

7. The termination of Charlie Doyle Smith

Following the events of September 22, Smith determined to quit his employment and did not return to work on September 23 or thereafter. The General Counsel contends that the termination of Smith was a direct result of Respondent's harassment of him for having engaged in union and other concerted activity and was therefore a constructive discharge in violation of Section

8(a)(3) of the Act. Respondent argues that Smith's termination was voluntary and therefore not a violation.

Smith was elected shop steward on the day of the election and thereafter functioned as the principal spokesman for the employees until his termination. He also was on the negotiating committee and generally aided in presenting grievances to Respondent. Smith's activity on behalf of the Union and fellow employees was well known to Respondent.

Although I have concluded that Respondent was justified in withdrawing recognition from the Union, nevertheless, there followed what might reasonably be described as a contentious atmosphere which was really none of Smith's doing. The Union's behavior was not any of Smith's doing. He was involved only in representing the employees of Respondent and he did so. He had nothing to do with the Conalco negotiations. Indeed, the troublesome aspect of this matter is that all Respondent's employees were innocent, yet, through the acts of their chosen representative, they lost, for a time at least, the right to bargain collectively. Prior to the Company's withdrawal of recognition, there had been charges of unfair labor practices including two discharges. Following the withdrawal of recognition occurred the events on September 22, during which Respondent denied Smith the right to be present when Wright, an employee who had been discharged previously, was being interrogated by the company principals in the president's office. Clearly, such signified an atmosphere of trouble and suggested that Respondent was embarked upon a course of unlawful conduct.

I therefore conclude that when Smith determined to quit his job, shortly following Reeves telling him to get back to work or his "ass would be fired," such was not voluntary. Rather, it was the result of Respondent's unlawful acts directed toward him and other employees. It was therefore a termination in violation of Section 8(a)(1) and (3) of the Act. E.g., *Liberty Markets, Inc.*, 236 NLRB 1486 (1978).

8. The warning

The General Counsel alleges that in August, through Supervisor Freddie Scholes, Respondent issued verbal and written warnings to James E. Hatcher and other employees. The evidence regarding this allegation involves only Hatcher, an individual who was hired as a welder trainee in July 1976 and was laid off in late August 1977.

On July 19, the employees went on strike protesting Respondent's discharge of Michael Poyner and Nelson Wright. They returned to work in early August. Within a couple of weeks thereafter, Hatcher was given a written warning pursuant to the Company's newly instituted progressive discipline system, discussed *supra*, on the grounds that the Company was dissatisfied with his production.

Hatcher testified without contradiction that one day his production was somewhat low because he had spent about 5 hours straightening a pattern, but that this was known to Scholes specifically and to supervision in general. Nevertheless, Scholes signed a written warning but, then during the course of a discussion of this matter be-

tween Hatcher, Scholes, and the three principals of Respondent, Scholes asked that his name be taken off the warning. His brother Ted Scholes, one of the owners, then signed the warning.

The warning was styled "Second warning" but Hatcher testified that, as far as he knew, he had never been given a first or oral warning.

While I conclude that the institution of the discipline system would not warrant issuance of a bargaining order remedy, nevertheless, it is clear that by instituting the discipline system and then effectuating it at least with regard to Hatcher, Respondent violated the Act. I conclude that the discipline of Hatcher was caused by the employees having engaged in concerted and union activity, specifically having gone on strike to protest discharge of two fellow employees.

Respondent brought forth no evidence to contradict the facts set forth by the General Counsel's witnesses. Respondent did not attempt to justify what on its face appears to be a pretextual and largely unjustified warning to an employee. I therefore conclude that, by implementing its progressive discipline system and specifically by issuing the warning to James E. Hatcher in late August, Respondent violated Section 8(a)(3) and (1) of the Act.

C. The Presettlement Conduct

In Case 26-CA-6722 it is alleged generally that Respondent engaged in conduct violative of the Act by interrogation, threats, having employees sign a statement that they could be discharged without cause within 90 days, discharging two employees, and taking certain action at odds with its bargaining obligations to the Union. Those allegations were resolved by execution of an informal settlement agreement approved by the Regional Director for Region 26 on August 15. That settlement agreement was withdrawn in the instant case.

Having found that Respondent has engaged in various violations of the Act subsequent to entering into the settlement agreement, I conclude that the Regional Director was justified in setting aside the informal settlement agreement. Thus, the matters alleged in Case 26-CA-6722 consolidated herein are properly before me for disposition. *Dynacor Plastics and Textiles Division of Medline Industries, Inc.*, 218 NLRB 1404 (1975).

Respondent having rested following the close of the General Counsel's case, the facts involving the allegations of unfair labor practices prior to the settlement agreement are largely undisputed. Further, the General Counsel's witnesses concerning these matters were generally credible.

1. The night shift

As noted above, on May 16, an election was held among Respondent's employees during which 12 votes were cast for the Union and 1 against it. Thus, on May 24, the Regional Director for Region 26 issued his Certification of Representative and on that date C. B. Hutton, an International representative for the Union, wrote Respondent demanding certain information and requesting

dates on which Respondent could meet to begin negotiations.

Though the precise date is unclear, shortly after the election Respondent hired a number of new employees and instituted a second shift in order to meet the increased demand for anode stem repair work requested by Conalco.

According to the testimony of Reeves, to ensure that these new employees understood they were being hired on a temporary basis, each new employee was required to sign the following statement:

I understand I am being hired as a temporary employee with Valley West Welding for ninety (90) days and can be dismissed at anytime because of the lack of work, dissatisfactory work or any other reason.

Further, in connection with establishing the night shift, the Company paid its employees on that shift an additional 15 cents per hour.

Establishing the night shift, paying a shift differential, and requiring the newly hired employees to sign the statement (which the General Counsel refers to as establishing a "probationary period") are alleged to be independent violations of Section 8(a)(1) of the Act as well as being violative of Respondent's bargaining obligations to the Union, inasmuch as they represent unilateral changes of working conditions.

The General Counsel contends that all employees hired after the election were placed on a 90-day probationary period, including those hired as strike replacements. The only evidence relating to this allegation is the testimony of two of Respondent's owners called by the General Counsel, and one statement, quoted above, signed by Dennis Shaffer.

Reeves testified that those employees required to sign the statement were those who were hired temporarily as a result of the increased demand from Conalco and the institution of the second shift. There is no evidence that any employee other than those hired in May or because of the increased Conalco demand was required to sign such a statement. While unclear from the record, it appears that the temporary employees were all assigned to the day shift and the more experienced employees were assigned the night shift.

While the General Counsel argues that Respondent established a probationary period, the statement could reasonably be interpreted to mean only what it says. That is, the employee understood he was being hired as a temporary.

The other evidence of record suggests that in fact Respondent hired additional employees in May and did institute the second shift because of the increased Conalco demand which was not thought at that time to be more than temporary. Conalco increased its demand for stems in order to have a stockpile in the event of an August strike.

Thus, while the evidence is rather sketchy on this point, I am persuaded that, in fact, Respondent did not institute a probationary period and thus change the basic working conditions of employees, including those newly

hired. Rather, I believe Respondent hired employees for a temporary amount of work and had them sign the statement to ensure that they were aware of the probable temporary nature of their employment.

But even if the institution of this procedure without notification to the certified bargaining representative could be deemed to be a violation of Section 8(a)(5), as noted above, the imposition of a remedial bargaining order would be inappropriate inasmuch as Respondent lawfully withdrew recognition from the Union.

The General Counsel further contends that, by instituting the night shift along with the shift differential, Respondent violated Section 8(a)(1) and (3) of the Act. The General Counsel has, however, directed my attention to no case wherein it has been held that an employer may not increase his staffing requirements based upon work available to be done or in creating a night shift that it is interference with employees' Section 7 rights to offer a shift differential.

I do not believe that the institution of the night shift for economic reasons or setting the wages for a night shift in any way tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. I therefore conclude that the institution of a night shift in May was not violative of Section 8(a)(1) of the Act.

But creating a second shift and hiring temporary employees certainly could impact on the working conditions of the regular bargaining unit employees and thus be the sort of thing which requires bargaining with the Union. For instance, had the Union been notified in advance that the Employer had the additional work which would require increasing its production force, the Union might have been able to negotiate the use of regular bargaining unit members on overtime, or perhaps some combination of overtime and hiring fewer new employees but hiring them as permanent employees. In any event, the fact of hiring temporary employees to do the additional work potentially affects the working conditions of those employees in the bargaining unit and hence is in an area where Respondent cannot with impunity make a unilateral decision.

However, as stated above, inasmuch as Respondent subsequently and lawfully withdrew recognition from the Union, it would now be inappropriate to enter a bargaining order.

2. The acts of Walter Russell

The General Counsel alleges that Walter Russell was the night-shift foreman and was a supervisor within the meaning of Section 2(11) of the Act. In its answer to the initial complaint, Respondent admits this allegation; however, in its answer to the subsequent consolidated complaint, it denies that Russell is a supervisor. Without resolving the propriety of Respondent's inconsistent answers in this respect, suffice it to note that the totality of the evidence in this matter shows that Russell did have the authority set forth in Section 2(11) of the Act.

For instance, Terry Russell testified without contradiction that his brother, Walter, hired him. Terry Russell testified:

Well, when I moved up here and I looked around and stuff, and I spoke to him [Walter Russell] on the phone before that, he says if I moved up here that he was foreman and he would give me a job.

So he took me out to Valley West before he hired me to introduce me to Mr. Reeves. And then he want to know if Mr. Reeves would have any objections of hiring his brother.

And Mr. Reeves says, "No, you can hire him, but," he says, "if he don't work out, you'll also have to be the one that fires him."

Also the uncontradicted evidence of other witnesses is that Walter Russell directed the work of employees on the night shift, that he had the title of night-shift foreman which was told to employees, that he assigned the work, and that he received a higher rate of pay than other employees. There is no dispute concerning these facts all of which support the General Counsel's allegation that Walter Russell was a supervisor within the meaning of Section 2(11) of the Act and that Respondent was responsible for his acts as set forth below.

Ted L. Palk testified that he wore a union button about 2 weeks before the election in early May and then after the election. Although unclear from his testimony precisely when his confrontation with Walter Russell occurred concerning this matter, Palk did testify without contradiction that on one occasion:

... he [Russell] come up to me and said he ought to take my button off and stomp my behind.

Q. (By Mr. Garrett) Is that exactly what he said?

A. No, sir, that isn't the exact words.

Q. Well, tell us the exact words.

A. He said stomp my ass.

This is a clear threat of physical harm because one has engaged in activity on behalf of a labor organization, and is thus violative of Section 8(a)(1) of the Act.

Nelson Wright testified that sometime during the week of his discharge (on May 27) he had discussions with Walter Russell concerning the Union and what the Union was going to demand. Following an initial exchange, Russell then returned to talk to Wright and according to Wright's uncontradicted testimony:

... he [Russell] said that the company could not afford and would do it, subcontract the work out, shut it down for a year, and they wasn't taking on no more jobs and they would shut it down.

Wright further testified that Russell told him the reason the Company would engage in such activity was because of the Union.

Again, the statements attributed to Russell are undenied. Further, I found Wright to be a generally credible witness and therefore conclude that Russell did make a statement along the lines attributed to him shortly following the election and that such was a threat of economic sanctions in violation of Section 8(a)(1) of the Act.

Similarly, Michael Poyner, who was also discharged on May 27, testified that during the week of his discharge, again on the night shift, he had a discussion with Walter Russell in which Russell stated that "the Company could shut down for a year and starve the employees out if they went out on strike. They could rent the building out for three years for aluminum molding company."

Again, the statements attributed to Russell amount to a threat in violation of Section 8(a)(1) and are uncontroverted. Further, I find Poyner to be generally a credible witness and I accordingly conclude that, in this regard, Russell made a threat in violation of Section 8(a)(1) of the Act.

Similarly, about a month after the discharges of Poyner and Wright, Russell had a conversation with Charlie Doyle Smith concerning the Union and the contract. According to Smith's uncontroverted and generally credible testimony, "Walter said that the company could subcontract out all the work and get rid of all the employees and still keep the foremen working." Smith testified that Russell went on to say that the Company could do this instead of giving the employees a contract. Again, the statement attributed to Russell by Smith is uncontroverted, is generally credible, and I find was a threat in violation of Section 8(a)(1) of the Act.

Finally, according to Terry Russell's uncontroverted and generally credible testimony, on an occasion following the filing of the initial charges in this matter, he told his brother Walter that he had given a statement. Walter Russell then told him, "If you lose this case you're going to have to leave."

Such is a threat to employees for exercising their right to engage in union activity as well as exercising their rights under the National Labor Relations Act. I find in this respect Walter Russell threatened an employee in violation of Section 8(a)(1) of the Act.

3. The acts of Teddy R. Scholes

Teddy R. Scholes (who identified himself on the record as Ralph Scholes) at the time material hereto was vice president and one of the owners of Respondent.

Sometime after the discharges of Poyner and Wright, Smith had a discussion with Scholes concerning these discharges. During this discussion, Scholes stated, "They couldn't let the Union influence them, but they had to have control over the shop and the people or they couldn't live with it; they'd just have to shut it down." Smith testified that Scholes said that the owners would shut down the plant. This statement by Scholes to Smith who at the time was acting as the president-elect and steward for the Union is clearly a threat in violation of Section 8(a)(1) of the Act. It is uncontroverted by Scholes and, as I found Smith to be a generally credible witness, I conclude that in this respect Respondent violated Section 8(a)(1) of the Act.

Scholes is also alleged to have interrogated employees about other employees' union activity on June 8 and again on June 9. As far as I am able to determine from the record, there is no evidence that such interrogation occurred as alleged nor has the General Counsel directed

by attention such evidence.⁵ Thus, I shall recommend this allegation be dismissed.

4. The acts of J. T. Reeves

It is alleged that, on or about June 10, Reeves violated Section 8(a)(1) by telling an employee that Respondent could shut down the facility. The General Counsel apparently relies on the testimony of Smith to establish this allegation. During a conversation concerning the discharge of Poyner and Wright, Reeves told Smith "that he could allow a union in there as long as it went his way, the company's way."

By this, the General Counsel apparently contends that Reeves threatened to close the facility. While such is a possible interpretation, it does not necessarily follow. Absent a more definitive statement, even though this is uncontroverted, I believe the evidence fails to support the allegation. Accordingly, I will recommend this allegation be dismissed.

5. The discharges of Michael Poyner and Nelson Wright

Poyner and Wright worked on the night shift and, on May 27, were terminated. Their testimony concerning the events surrounding their discharges is undisputed. The only witness testifying on behalf of Respondent concerning this matter was Teddy Scholes, who said he discharged Poyner and Wright following his interview of two employees whom Poyner and Wright were alleged to have threatened. And, he said, based upon these assertions, he determined to discharge Poyner and Wright. The two employees alleged to have been threatened by Poyner and Wright were not called as witnesses.

An employer may discharge an employee for any reason or no reason at all except where motivated by that employee's union or other protected concerted activity. Thus, the essence of an allegedly unlawful discharge involves motivation and since rarely, if ever, can motivation be established by direct evidence, circumstantial evidence is permitted. In this respect, where the asserted reasons advanced by the employer for the discharge are found by the trier of fact to be false, then an inference can be made that the true motive lies elsewhere and that the true motive was the employee's union or other concerted activity. *Shattuck Denn Mining Corporation (Iron King Branch)*, 362 F.2d 466 (9th Cir. 1966). Thus, while an employer may discharge an employee for a good reason or no reason at all, where the reason advanced by the employer does not stand scrutiny, then that fact itself is evidence that the employer acted with an unlawful motive. Such I find to be the case in this situation.

Scholes testified that he discharged Poyner and Wright for having threatened two other employees in an attempt to force them, he thought, to join the Union. And he took statements purporting to be the statements

⁵ There is some evidence that Scholes interrogated two employees prior to discharging Poyner and Wright in order to determine, according to him, the basis for discharging them. This event, however, took place sometime prior to June 8 and 9 and, in any event, did not involve interrogation of the employees' union activity.

of two employees in question. However, he did not interview Wright or Poyner concerning this matter and neither did Respondent call as witnesses the two employees in question to verify what they were supposed to have told Scholes. Given these factors, I conclude that the alleged reason advanced for discharging Poyner and Wright was known to have had an insubstantial factual basis and was a pretext.

Poyner's undisputed and generally credible testimony was that, on the night of May 27, he had a discussion with other employees concerning whether or not they would cross the picket line should there be a strike. He denied hearing or making any threats.

According to Poyner's testimony, the only comment made to either of the two other employees was by Wright, who said, "If you had any respect for us, you wouldn't cross the picket line."⁶

Poyner further testified that, following his conversation with the two employees, one of the owners, O'Neal Dickson, called him to ask, "I want to know what the hell you all was into back there." Poyner testified, "I told him that we were just asking them [the two employees] if it was true if you all was going to bring them across the picket line." And then, "O'Neal Dickson got mad and just said, 'God damn it, I'm going to make sure that this goes on y'all's record and it looks bad.'"

Wright's uncontradicted testimony was that during the course of talking to the two other employees about whether they would cross the picket line one (Dennis Shaffer) said that he would not but the other (Douglas Ellis) said, "I got respect for you," and he had two fingers pointing each one of us in the chest."

Q. Who was "each one of us" now?

A. Michael Poyner, Dennis Shaffer and myself. He said, "But there ain't no SOB going to—"

Q. Is that what he said?

A. Well, he said it plainer than that.

Q. Well, tell us what he said.

A. Said wasn't no son of a bitch going to scare him, threaten him. And no one was even talking to him. And I said, "Well, if you had respect for us, you would honor our picket line."

And then according to Wright's testimony Ellis talked in a loud voice, and then he left. About this time, Wright and Poyner started back to the break area and Dickson asked why they were bothering Ellis. Wright told Dickson that they were just asking him if he would honor a picket line if it came to that. Dickson said, "I don't think that's any of your goddamn business, is it?"

More conversation ensued about the honoring of the picket line and again Ellis said that nobody was going to threaten him, although no threat was ever made, again according to Wright's generally credible and undisputed testimony.

⁶ In his affidavit, Poyner suggested that he had heard, on the evening in question, that a Conalco employee who had crossed a picket line and his wife and children had been threatened. This may raise an inference that a statement along those lines may have been made, but does not in and of itself suggest that either Poyner or Wright in fact made a threat to either of the two individuals whom they are alleged to have threatened. And it is not sufficient to discredit Poyner's testimony.

About 30 minutes later, Walter Russell told Poyner and Wright to get their tools, they were discharged. In the office, Reeves said that he had discharged them for threatening the men and leaving their work stations.

It is clear from the undisputed testimony of Poyner and Wright that they in fact were discussing matters relating to their union and other concerted activity and were asking fellow employees if they would join. While Respondent takes a position that Poyner and Wright threatened the two employees, the only credible evidence of record is to the contrary. No threats were made and certainly none of a magnitude to justify discharging one for engaging in protected activity. Accordingly, I conclude that Respondent's reason for discharging Poyner and Wright was a pretext and that the true motive concerned their having engaged in protected concerted union activity. Their discharges on May 27 were violative of Section 8(a)(3) of the Act.

D. The Allegations in Case 26-CA-7700

During the hiatus in these proceedings, occasioned by the General Counsel's litigation to enforce the subpoenas, *supra*, the Union filed an additional charge. The General Counsel moved to amend the complaint to allege, in general, that on or about January 29, 1978, Respondent unilaterally implemented changes in the employees' pay rates and a method for evaluating employees to be recalled. Further, it is alleged that, on or about January 29, Respondent discriminatorily devised a warning system to avoid recalling laid-off employees. By these allegations, Respondent is alleged to have violated Section 8(a)(3) and (5) of the Act.

Both Reeves and Teddy Scholes testified that, in late 1977, the amount of work to be done increased such that they felt Respondent should hire additional employees and determined to offer jobs to some of those employees who were laid off in August 1977. Both testified that, in determining which employees to rehire, they took into consideration experience, ability as well as past performance for Respondent. They did not, however, consult with the Union concerning the criteria to be used in offering jobs to laid-off employees.

Pursuant then to their decision, Respondent sent out letters of job offers to five or six of the employees who had been laid off in 1977. Some of those employees accepted. The employees recalled were original members of the bargaining unit and presumptively had voted in favor of the Union, inasmuch as the outcome of the election was 12 to 1. There is no evidence to indicate that Respondent used any criteria other than experience or ability in determining which of the employees laid off to recall. In short, there is no evidence that Respondent based its determination on who to rehire on an antiunion or other discriminatory basis. Indeed, the inference is to the contrary since Respondent recalled known union supporters.

While Scholes and Reeves admit they did not consult with the Union, it is noted that at that time Respondent had withdrawn recognition from the Union. Since this withdrawal of recognition was lawful, Respondent had

no obligation to consult with the Union concerning the manner and method of recalling laid-off employees.

There are no facts to support the General Counsel's contention that a discriminatorily devised warning system existed to avoid recalling laid-off employees nor is there any evidence to suggest that the method utilized by Respondent to select those for recall was in any way discriminatory or otherwise violative of the Act.

Finally, it is contended that, in January, Respondent unilaterally implemented changes in employees' pay. Both Reeves and Scholes admitted that they increased employees' pay rates at or about that time and both agreed that they did not consult with the Union. Again, as I have concluded that Respondent was under no obligation to notify or consult with the Union before making changes in employees' wages and working conditions, Respondent did not violate its bargaining obligations under Section 8(a)(5) of the Act; nor is there any evidence to suggest that the granting of the wage increase was otherwise violative of the Act.

Accordingly, I conclude that the General Counsel has not sustained his burden of proving the allegations set forth in the amendments to the complaint based upon the charge in Case 26-CA-7700 and I will recommend that they be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices found occurring in connection with Respondent's business have a substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom, and take certain affirmative action including offering reinstatement to Charlie Doyle Smith to his former job or, if that job no longer exists, to a substantially equivalent position of employment without prejudice to his seniority or other rights and benefits, and make him and Michael Poyner and Nelson Wright whole for any wages and other benefits they may have lost as a result of the discrimination against them in accordance with the formula as set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as provided for in *Florida Steel Corporation*, 231 NLRB 651 (1977);⁷ Poyner and Wright having been reinstated to their former positions prior to the commencement of the hearing in this matter.

Upon the foregoing findings of fact, conclusions of law, the entire record in this matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁸

The Respondent, Valley West Welding Company, Inc., Waverly, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees to shut down the plant or with other reprisals for their having engaged in union or other protected concerted activity.

(b) Discharging employees because of their interest in or activity on behalf of the Union or because they engaged in other protected concerted activity.

(c) Denying an employee representation by a fellow employee during the course of a disciplinary interview.

(d) Issuing warnings to employees because of their interest in or activity on behalf of the Union or because they have engaged in other protected concerted activity.

(e) Threatening employees with physical harm because they have engaged in union or other protected concerted activity.

(f) Threatening employees with discharge because they have engaged in union or other protected concerted activity.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

(a) Offer immediate and full reinstatement to Charlie Doyle Smith to his former job or, if that job no longer exists, to a substantially equivalent position of employment without prejudice to his seniority or other rights and privileges, and make him, Michael Poyner, and Nelson Wright whole for any wages or other benefits they may have lost as a result of the discrimination against them in accordance with the formula set forth in the remedy section above.

(b) Expunge from the personnel record of James E. Hatcher the warning issued him in July 1977.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Waverly, Tennessee, copies of the attached notice marked "Appendix."⁹ Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees

⁸ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁷ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the allegations in the consolidated complaints in all aspects not specifically found are hereby dismissed.